# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 01

BOCH IMPORTS, INC. d/b/a BOCH HONDA

and

Case 01-CA-083551

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, DISTRICT LODGE 15, LOCAL LODGE 447

COUNSEL FOR THE GENERAL COUNSEL'S REPLY BRIEF TO THE MEMORANDUM IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Daniel F. Fein
Counsel for the General Counsel
National Labor Relations Board
Region 01
Thomas P. O'Neill Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, Massachusetts 02222-1072

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#### A. STATEMENT OF THE CASE

Associate Chief Administrative Law Judge Joel P. Biblowitz heard this case in Boston, Massachusetts on November 18, 2013. On January 13, 2014, Judge Biblowitz issued his decision, in which he made certain findings of fact and conclusions of law and recommended that Respondent be ordered to refrain from certain actions and to take certain affirmative actions in order to effectuate the purposes of the Act. Judge Biblowitz correctly decided that Respondent maintained various unlawful provisions in its July 19, 2010 Boch Enterprises Employee Handbook (the 2010 Handbook) and that Respondent maintained an unlawful provision in its May 2013 Boch Enterprises Employee Handbook (the 2013 Handbook).

On March 3, 2014, Respondent filed Exceptions to the Administrative Law

Judge's Decision and a Memorandum in Support of Respondent's Exceptions to the

Administrative Law Judge's Decision with the Board. This brief is submitted in response to Respondent's Exceptions and its Memorandum in Support.

#### B. <u>OVERVIEW</u>

This case involves Boch Imports, Inc. d/b/a Boch Honda (Respondent), which, as the Judge correctly found, violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 151, et seq. (the Act), by maintaining various unlawful provisions in its 2010 Handbook, and which continues to violate Section 8(a)(1) of the Act by maintaining an unlawful provision in its 2013 Handbook. Respondent, which operates an automobile dealership in Norwood, Massachusetts, maintained its 2010 Handbook from December 21, 2011 (the applicable Section 10(b) date) until April 2013, when it was superseded by

Respondent's May 2013 Handbook, which remains in effect.<sup>1</sup> Both the 2010 Handbook and the 2013 Handbook contain unlawfully overbroad policies which interfere with employees' rights to engage in protected concerted activity under Section 7 of the Act.

After setting forth the facts concerning the 2010 Handbook and the 2013 Handbook provisions in issue, the legal analysis that follows will establish that, as Judge Biblowitz correctly found, these provisions violate Section 8(a)(1) of the Act. In addition, the evidence will show that, as Judge Biblowitz correctly found, the 2010 Handbook applied, and the 2013 Handbook applies, not only to Respondent's employees, but to employees of numerous other Boch automobile dealerships and business entities.

Therefore, as Judge Biblowitz correctly found, the appropriate remedy for Respondent's Section 8(a)(1) violations must apply to Respondent and to the other Boch automobile dealerships and business entities whose employees were subject to the 2010 Handbook and whose employees are subject to the 2013 Handbook.

## C. STATEMENT OF THE ISSUES

- 1. Did the Judge correctly conclude that that Respondent violated Section 8(a)(1) of the Act by maintaining provisions in its 2010 Handbook from December 21, 2011 until about May 2013 concerning Confidential and Proprietary Information, Discourtesy, Inquiries Concerning Employees, Dress Code and Personal Hygiene, Solicitation and Distribution Policy, and Social Media Policy, and did the Judge correctly conclude that the allegations contained in Paragraphs 7 and 8 of the Amended Complaint are not moot? (Respondent's Exceptions 1, 7, and 11)
- 2. Did the Judge correctly rely on *Passavant Mem'l Area Hosp.*, 237 NLRB 138 (1978), and *Elec. Workers Ibew Local 1316 (Superior Contractors)*, 271 NLRB 338 (1984), in concluding that Respondent violated Section 8(a)(1) with respect to various provisions contained in its 2010 Handbook? (Respondent's Exceptions 2, 3, 5, and 6)

<sup>1</sup> The International Association of Machinists and Aerospace Workers, District Lodge 15, Local Lodge 447 (the Union) filed this charge against Respondent on June 20, 2012. The Complaint and Notice of Hearing issued on December 31, 2012. An Amended Complaint and Notice of Hearing issued on June 17, 2013.

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- 3. Did the Judge correctly conclude that in May 2013 Respondent issued the 2013 Handbook, modifying the 2010 Handbook provisions in issue with the exception of the Dress Code provision? (Respondent's Exception 4)
- 4. Did the Judge correctly conclude that Respondent failed to establish any special circumstances warranting its prohibition of employees wearing insignias or other message clothing and that Respondent's blanket prohibition banning employees from wearing insignias or other message clothing violates Section 8(a)(1) of the Act? (Respondent's Exceptions 8, 9, 10, and 12)
- 5. Did the Judge correctly conclude that because the 2010 Handbook was, and the 2013 Handbook is, effective at all Boch Enterprises dealerships, employees at all such dealerships should be aware of his findings, and did the Judge fashion an appropriate remedy and issue an appropriate Order? (Respondent's Exceptions 13, 14, and 15)

## D. STATEMENT OF FACTS

1. Respondent's 2010 Handbook

Respondent's 2010 Handbook was in effect from July 2010 until April 2013 and applies to Respondent's employees (T. 21-22; GCX 2)<sup>2</sup>. In addition to Respondent's employees, the 2010 Handbook applied to employees employed at all Boch automobile dealerships and business entities (T. 17-21; GCX 4).

(a) The Confidential and Proprietary Information Policy

Respondent's 2010 Handbook included a Confidential and Proprietary Information policy. That policy stated, in relevant part:

#### Confidential Information

Confidential Information means any Company proprietary, secret or other privileged information, technical data, compilation, research, data, trade secrets or know-how, whether or not meeting the legal definition of a trade secret, concerning: (a) research and development information; (b) the Company's customers, suppliers, and/or prospective customers and suppliers, including their identity, special needs, job orders, preferences, transaction histories, contacts, characteristics, agreements and prices; (c)

<sup>&</sup>lt;sup>2</sup> The trial transcript will be cited as "T. (page number)." General Counsel's exhibits will be cited as "GCX (number)" and Respondent's exhibits will be cited as "RX (number)." Rejected exhibits will be cited as "RJX (number)."

markets; (d) hardware configuration information, software developments, or computer processed data; (e) inventions, processes, formulas, technology, designs, drawings or engineering information; (f) systems and procedures, including but not limited to the Toyota Signature Program Manual: (g) pricing structures, profitability, costs, finances, tax, projections, sales information or estimating processes; (h) product, service or marketing information, plans, studies, proposals, specifications, activities, promotions, compensation structures, incentive programs, or operations; (i) business development center computer processes or dealer communication system information; (j) Company policies, procedures, litigation activity or other business information disclosed to the Employee by the Company, either directly or indirectly, in writing, orally, or by drawings or inspections of parts or equipment, or otherwise acquired by the Employee during his/her employment with the Company. Confidential Information also includes any and all information that the Company is obligated to maintain as confidential, or that the Company may receive or has received from others with any understanding, express or implied, that it will not be disclosed. (GCX 2 at p.9)

That policy also stated, in relevant part:

## Non-Disclosure/Non-Use Obligation

During the term of an employee's employment with the Company and thereafter at any time, the employee will not, directly or indirectly, use or disclose to anyone, or authorize disclosure or use of, any of the Confidential Information, Customer Information or Third Party Information revealed to or learned by the Employee during the course of the Employee's employment with the Company, unless such disclosure is both consistent with the Company's obligations and for the sole purpose of carrying out the Employee's duties to the Company. Employees must understand that this restriction will continue to apply after the Employee's termination, regardless of the reason for such termination and the employee will be signing agreements to that effect which also relate to complying with all policies and procedures of the Company for protecting Confidential Information, Customer Information and Third Party Information. (GCX 2 at pp.9-10)

(b) The Company Policies-General Rules of Conduct Policy

Respondent's 2010 Handbook included a Company Policies-General Rules of

Conduct policy. That policy stated, in relevant part:

## **Discourtesy**

<sup>&</sup>lt;sup>3</sup> Although Respondent in this case operates a Honda dealership, as noted above, the 2010 Employee Handbook applied to employees employed at all Boch automobile dealerships and business entities, which, among others, include Toyota dealerships (GCX 4).

All employees are expected to be courteous, polite and friendly both to customers and to their fellow employees. The use of profanity or disrespect to a customer or co-worker, or engaging in any activity which could harm the image of the Company, is strictly prohibited (GCX 2 at p. 23).

(c) The Inquiries Concerning Employees Policy

Respondent's 2010 Handbook included an Inquiries Concerning Employees policy. That policy stated, in relevant part:

All inquiries from outside sources concerning employees should be directed to the Human Resources Department. An employee shall not provide personal information of any nature concerning another employee (including references) to any outside source unless approved by the Human Resources Department and authorized, in writing, by the employee (GCX 2 at p. 28).

(d) The Dress Code and Personal Hygiene Policy

Respondent's 2010 Handbook included a Dress Code and Personal Hygiene policy. That policy stated, in relevant part:

A maximum of two (2) studs or one (1) stud and one (1) small hoop may be worn in an ear.

Employees who have contact with the public may not wear pins, insignia, or other message clothing which are not provided to them by the Employer (GCX 2 at pp.30-31).

(e) The Solicitation and Distribution Policy

Respondent's 2010 Handbook included a Solicitation and Distribution policy.

That policy stated, in relevant part:

Persons who are not employed by the Company are prohibited from soliciting and from distributing literature or other materials, for any purpose and at any time, within the Company's buildings or property or on or adjacent to the Company's premises (GCX 2 at p. 31).

(f) The Social Media Policy

Respondent's 2010 Handbook included a Social Media policy. That policy stated, in relevant part:

- 1. Employees who post social media, whether at work or outside work and whether during or after business hours, must abide by the Company's policies and procedures, including those concerning harassment, confidential information, financial information, personal information, intellectual property, trade secrets, etc. To ensure compliance with consumer and driver privacy laws and other legal requirements, the Company requires its employees to confine any and all social media commentaries to topics that do not disclose any personal or financial information of employees, customers, or other persons, and do not disclose any confidential or proprietary information of the Company (GCX 2 at p. 32).
- 2. Employees may make social media posts on behalf of the Company only if specifically authorized. If an employee posts comments about the Company or related to the Company's business or a policy issue, the employee must identify him/herself and include a disclaimer indicating that this is a personal opinion and that he/she is not speaking for the Company (GCX 2 at p. 32).
- 5. If an employee's online blog, posting or other social media activities are inconsistent with, or would negatively impact the Company's reputation or brand, the employee should not refer to the Company, or identify his/her connection to the Company (GCX 2 at p. 33).
- 7. While the Company respects employees' privacy, conduct that has or has the potential to have a negative effect on the Company might be subject to disciplinary action up to and including termination, even if the conduct occurs off the property or off the clock. It does not matter if the conduct is communicated in person or by phone, computer or other electronic vehicle (GCX 2 at p. 33).
- 8. The Company's intellectual property, logos, trademarks, and copyrights may not be used in any manner, unless the employee has first obtained permission from an authorized manager. Employees may not post videos or photos which are recorded in the workplace, without the Company's permission (GCX 2 at p. 33).
- 9. Social media postings occasionally generate media coverage. If an employee is ever asked to make a comment to the media, the employee should contact the Vice President of Operations before making a statement (GCX 2 at p. 33).
- 10. The Company may request that an employee temporarily confine it (sic) social media activities to topics unrelated to the Company or a particular issue if it believes this is necessary or advisable to ensure compliance with applicable laws or regulations or the policies in the Employee Handbook. The Company

may also request that employees provide it access to any commentary they posted on social media sites (GCX 2 at p. 33).

11. Employees choosing to write or post should write and post respectfully regarding current, former or potential customers, business partners, employees, competitors, managers and the Company. Employees will be held responsible for and can be disciplined for what they post or write on any social media. However, nothing in this policy is intended to interfere with employees' rights under the National Labor Relations Act (GCX 2 at p. 33).

#### 2. Respondent's 2013 Handbook

Respondent's 2013 Handbook has been in effect since May 2013 and applies to Respondent's employees (T. 22; GCX 3). In addition to Respondent, the 2013 Handbook applies to employees employed at all Boch automobile dealerships and business entities (T. 17-21; GCX 4).

(a) The Dress Code and Personal Hygiene Policy

Respondent's 2013 Handbook includes a Dress Code and Personal Hygiene policy. That policy states, in relevant part:

A maximum of two (2) studs or one (1) stud and one (1) small hoop may be worn in an ear.

Employees who have contact with the public may not wear pins, insignia, or other message clothing. (GCX 3 at pp. 32-33)

3. Respondent's Employee Work and Dress Requirements and Employee Contact with the Public

Respondent's Service Director, David Carlson, testified that he supervises two service managers, six service advisors, and 16 to 17 technicians (T. 40-41).

Respondent pays for and provides its technicians with uniforms that include pants, shirts, jackets, and hats which say "Boch" on them, which technicians are required to

wear while working (T.41, 45, 49-50). The uniforms are approved by American Honda<sup>4</sup> (T. 42). Technicians never wear pins or buttons on their uniforms, whether provided by American Honda, Respondent, or employees (T. 42-43). Service advisors also wear uniforms that say Boch Honda and they are prohibited from wearing buttons, pins, and insignia (T. 65-66).

Technicians perform all facets of automotive repair except for painting vehicles (T. 43). Technicians perform a pre-delivery inspection (PDI) when a new vehicle is delivered to the dealership and perform a multi-point inspection (MPI), which is similar to a PDI, when a used vehicle arrives at the dealership. Both inspections cover vehicle safety, emissions compliance, and cosmetic issues (T. 46-49). Technicians interact with customers during road tests, when examining vehicles in the shop, in the showroom when retrieving vehicles or keys, in the parking lot, and at the cashier's station (T. 49-50, 55, 73-74; RX 6). Customers can observe technicians working in the shop through windows inside the dealership (T.55-56). Technicians are permitted to, and have, put stickers on their personally-owned toolboxes, which remain in the shop. In this regard, some technicians presently display Union stickers on their toolboxes (T. 56-61; RX 7, RX 8, RX 9). Technicians' toolboxes are visible to customers walking through Respondent's shop (T. 57-58).

Service advisors spend all of their time with the public (T. 65). Service advisors discuss vehicle concerns with customers and prepare work orders. If there are customer issues that need clarification, a service advisor may elect to include a technician in their conversation. Such interactions may take place in the service drive,

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<sup>&</sup>lt;sup>4</sup> The transcript variously refers to American Honda Motor Co., Inc. – the automobile manufacturer whose vehicles Respondent sells and services – as "Honda," "American Honda," and "Honda of America." American Honda Motor Co., Inc. will be referred to herein as "American Honda."

during a road test, in the shop, or after repair work has been completed (T. 67-68).

Service advisors also offer to check customers' vehicles' fluid levels and therefore may be under the hood. In addition, they take odometer readings from inside vehicles (T. 69). Service advisors may also review MPI reports that technicians complete for vehicles being serviced and may escort customers to the shop to show them a part, such as a pollen or cabin filter, which Respondent recommends be replaced (T. 72-73).

Respondent's General Manager, Mark Doran, testified that Respondent seeks to project a professional appearance and spends hundreds of thousands of dollars per month on print, internet, television, and radio advertising (T. 76-78). Respondent does not allow employees to wear pins in recognition of charitable activities such as donating blood during one of Respondent's blood drives or supporting medical research causes, nor does Respondent allow employees to wear American flag pins, due to safety and in order to minimize vehicle damage (T. 78-80). Doran testified that Respondent is "there to sell vehicles and service customers." (T. 79).

Sales employees must be professionally attired while they are working (T. 86-87). In this regard, sales personnel wear either short or long sleeve Boch Honda jerseys or a shirt and tie. Respondent has also provided sales people with Boch Honda jackets that say "Number 1 in the Country" or "Number 1 on the Planet" to tout Respondent's status as the top selling Honda dealership (T. 82-83). Doran also testified that employees were permitted to wear Boston Red Sox and Boston Bruins shirts, for example, during a benefit/fundraising day in support of Boston Strong (T. 90).

Sales personnel have contact with vehicles prior to being delivered because they work with the service department and the technicians and they may lift a used vehicle's

hood when appraising it. Sales personnel also affix license plates to vehicles (T.88-90).

Employees have previously engaged in Section 7 protected picketing on its property (T. 84-86; RX 11)<sup>5</sup>. Respondent's counsel asserted, without support, that this activity "adversely affected the sale of cars and customers...." (T. 86). However, the record contains no evidence demonstrating that this lawful Section 7 activity in any way adversely affected Respondent's business image or sales, despite counsel's naked assertion in this regard.

## E. ANALYSIS

1. The Judge correctly concluded that Respondent violated Section 8(a)(1) of the Act by maintaining provisions in its 2010 Handbook from December 21, 2011 until about May 2013 concerning Confidential and Proprietary Information, Discourtesy, Inquiries Concerning Employees, Dress Code and Personal Hygiene, Solicitation and Distribution Policy, and Social Media Policy, and the Judge correctly concluded that the allegations contained in Paragraphs 7 and 8 of the Amended Complaint are not moot. (Respondent's Exceptions 1, 7, and 11)

Respondent contends that the Judge erred in concluding that Respondent violated Section 8(a)(1) of the Act by maintaining provisions in its 2010 Handbook from December 21, 2011 until about May 2013, concerning Confidential and Proprietary Information, Discourtesy, Inquiries Concerning Employees, Dress Code and Personal Hygiene, Solicitation and Distribution Policy, and Social Media Policy (ALJD 5:49-8:18)<sup>6</sup>. However, as set forth below, Respondent's arguments in this respect are unavailing and the Board should uphold the Judge's findings.

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 $<sup>^{\</sup>rm 5}$  The Administrative Law Judge rejected RX 11 and marked it as RJX 1.

<sup>&</sup>lt;sup>6</sup> References to the Judge's decision will be cited as "ALJD page number:line number."

The Board's legal standard for evaluating the lawfulness of work rules is well established. An employer violates Section 8(a)(1) of the Act by maintaining a work rule if that rule would "reasonably tend to chill employees in the exercise of their Section 7 rights." The Board has developed a two-step inquiry to determine if a work rule would have such an effect. First, a rule is unlawful if it explicitly restricts Section 7 activities. If the rule does not explicitly restrict protected activities, it will violate the Act only upon a showing that: (1) employees would reasonably construe the rule's language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Rules that are ambiguous as to their application to Section 7 activity and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights are unlawful.<sup>10</sup> In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they would not reasonably be construed to cover protected activity, are lawful.<sup>11</sup>

<sup>&</sup>lt;sup>7</sup> Lafayette Park Hotel, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

<sup>&</sup>lt;sup>8</sup> Lutheran Heritage Village–Livonia, 343 NLRB 646, 647 (2004).

<sup>&</sup>lt;sup>9</sup> *Ibid*.

<sup>&</sup>lt;sup>10</sup> See *University Medical Center*, 335 NLRB 1318, 1320-1322 (2001), enf. denied in relevant part 335 F.3d 1079 (D.C. Cir. 2003) (work rule that prohibited "disrespectful conduct towards [others]" unlawful because it included "no limiting language [that] removes [the rule's] ambiguity and limits its broad scope.") See also *Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at 2 (2012) ("Board law is settled that ambiguous employer rules – rules that reasonably could be read to have a coercive meaning – are construed against the employer. This principle follows from the Act's goal of preventing employees from being chilled in the exercise of their Section 7 rights, whether or not that is the [employer's] intent…").

<sup>&</sup>lt;sup>11</sup> See *Tradesmen Intl.*, 338 NLRB 460, 460-462 (2002) (prohibition against "disloyal, disruptive, competitive, or damaging conduct" would not be reasonably construed to cover protected activity, given the rule's focus on other clearly illegal or egregious activity and the absence of any application against protected activity); *Palms Hotel and Casino*, 344 NLRB 1363, 1367-1368 (2005) (rule which prohibited conduct which is or has the effect of being "injurious, offensive, threatening, intimidating, coercing," or interfering with "coworkers or customers" was aimed at ensuring "civility and decorum" in the workplace and did not refer to conduct that is an inherent aspect of Section 7 activity).

Additionally, when determining whether a challenged work rule is lawful, the rule must be given a reasonable reading, phrases should not be read in isolation, and improper interference with employee rights is not to be presumed.<sup>12</sup>

(a) Respondent's Confidential and Proprietary Information Policy in the 2010 Handbook Contained Overbroad Provisions that Unlawfully Restricted Employees in the Exercise of Their Section 7 Rights.

Under the heading Confidential Information, the Confidential and Proprietary Information policy contained in Respondent's 2010 Handbook defined confidential and proprietary information to include "(b) the Company's customers, suppliers and/or prospective customers, including their identity...(h) product, service or marketing information, plans, studies, proposals, specifications, compensation structures, incentive programs, or operations [and] (j) Company policies, procedures, litigation activity or other business information...." (Emphasis supplied.)

Under the heading Non-Disclosure/Non-Use Obligation, the Confidential and Proprietary Information policy contained in Respondent's 2010 Handbook provided that,

During the term of an employee's employment with the Company and thereafter at any time, the employee will not, either directly or indirectly, use or disclose to anyone, or authorize disclosure or use of, any of the Confidential Information, Customer Information or Third Party Information revealed to or learned by the Employee during the course of the Employee's employment with the Company, unless such disclosure is both consistent with the Company's obligations and for the sole purpose of carrying out the Employee's duties to the Company. Employees must understand that this restriction will continue to apply after the Employee's termination, regardless of the reason for such termination and the employee will be signing agreements to that effect which also relate to complying with all policies and procedures of the Company for protecting Confidential Information, Customer Information and Third Party Information.

<sup>&</sup>lt;sup>12</sup> Lutheran Heritage Village-Livonia, supra, at 646, citing Lafayette Park Hotel, supra, at 825, 827.

As the Judge correctly found, to the extent Respondent's Confidential Information policy treats as confidential Respondent's compensation structures and incentive programs, this rule violates Section 8(a)(1) of the Act (ALJD 5:49-6:29). Thus, it is axiomatic that the rule's prohibition of disclosing compensation structures and incentive programs would reasonably tend to chill employees in the exercise of their Section 7 rights, since these matters plainly encompass employees' terms and conditions of employment and the provision does not contain limiting language or context that would clarify for employees that the rule does not restrict their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998); *University Medical Center*, 335 NLRB 1318, 1320-1322 (2001). As the Judge rightly found (ALJD 6:26-29), these aspects of Respondent's Confidential Information policy therefore all clearly violate Section 8(a)(1) of the Act under established Board law.

Likewise, it is evident that the 2010 Handbook's Non-Disclosure/Non-Use Obligation provision, which prohibits employees from disclosing to anyone or authorizing the disclosure or use of confidential information, customer information, or third-party information violates Section 8(a)(1) of the Act because it *expressly* incorporates Respondent's unlawfully overbroad definition of confidential information, set forth above.

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<sup>&</sup>lt;sup>13</sup> As noted in Counsel for the General Counsel's Cross-Exception Number 5 and his supporting brief, the Judge erred by failing to make factual and legal findings that the Confidential and Proprietary Information policy in the 2010 Handbook included the identities of Respondent's customers and/or prospective customers and Respondent's policies, procedures, and litigation activity as confidential and that Respondent violated Section 8(a)(1) of the Act with respect to these aspects of this policy. For the reasons set forth in Counsel for the General Counsel's Brief in Support of Cross-Exceptions relating to Cross-Exception Number 5, the Board should correct these factual and legal errors.

(b) Respondent's Discourtesy Policy, Set Forth in the 2010 Handbook's Company Policies-General Rules of Conduct Policy, Unlawfully Restricted Employees in the Exercise of Their Section 7 Rights.

Respondent's Discourtesy policy provides, in part, that employees are forbidden from engaging in any activity which could harm Respondent's image. The Judge properly found that this prohibition interferes with employees' Section 7 rights because it obviously encompasses concerted communications protesting Respondent's treatment of employees (ALJD 6:42-46). See generally *Costco Warehouse Corp.*, 358 NLRB No. 106, slip op. at 1-2 (2012) (internal citations omitted). Moreover, an employee reading this rule would reasonably understand that Respondent would consider statements critical of its labor policies or treatment of employees as harming Respondent's image. *Karl Knauz Motors, Inc.*, 358 NLRB No. 164, slip op. at 1-2 (2012). Therefore, the Judge correctly held that this portion of Respondent's Discourtesy rule violated Section 8(a)(1) of the Act (ALJD 6:42-46).

(c) Respondent's Inquiries Concerning Employees Policy in the 2010 Handbook Is Facially Invalid Because It Restricted Employees in the Exercise of Their Section 7 Rights.

Respondent's Inquiries Concerning Employees policy instructs employees to refer all outside inquiries concerning employees to Respondent's Human Resources

Department and forbids employees from providing personal information of any nature concerning coworkers to any outside source unless approved by the Human Resources

Department and authorized by the employee in writing. Thus, a plain reading of the rule is that it prohibits employees from sharing information about terms and conditions of employment with, or providing employee contact information to, a labor organization or the Board without employees first notifying and securing authorization from Respondent

and coworkers. As the Judge correctly found, this rule is unquestionably unlawful because any employee reading it would reasonably construe it to prohibit lawful Section 7 activity (ALJD 6:48-7:8). See *Lutheran Heritage Village-Livonia*, 343 NLRB at 647. See also *Bigg's Foods*, 347 NLRB 425, 425 n.4 (2006) (rule which forbade disclosing salaries to "anyone outside the company" unlawful because it would prohibit discussing salaries with union representatives); *Kinder-Care Learning Centers*, 299 NLRB at 1172 (1990).

(d) Respondent's 2010 Handbook Unlawfully Prohibited Non-Employees from Soliciting or Distributing Materials for Any Purpose at Any Time on Property Adjacent to Respondent's Premises.

Respondent's 2010 Handbook contained a Solicitation and Distribution policy which provided, in relevant part, that "Persons who are not employed by the Company are prohibited from soliciting and from distributing literature or other materials, for any purpose and at any time, within the Company's buildings or property or on or adjacent to the Company's premises." (Emphasis supplied.) The Judge correctly found that this provision violated Section 8(a)(1) of the Act (ALJD 7:19-20).

In this regard, the Judge aptly noted that in *Bristol Farms*, 311 NLRB 437, 437 (1993), the Board stated that "[i]t is beyond question that an employer's exclusion of union representatives from public property violates Section 8(a)(1) so long as the union representatives are engaged in activity protected by Section 7 of the Act."<sup>14</sup> (ALJD 7:16-20). The Board also noted, supra at 437-438 n.6, that the Supreme Court in *Lechmere*, *Inc. v. NLRB*, 502 U.S. 527 (1992), did not grant certiorari to the Board's holding, which the First Circuit affirmed in *Lechmere*, *Inc. v. NLRB*, 914 F.2d 313, 325 (1st Cir. 1990),

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<sup>&</sup>lt;sup>14</sup> See also Equitable Life Assurance Society of the U.S., 343 NLRB 438, 439 (2004).

that the employer violated the Act by seeking to expel the organizers from public property adjoining the employer's property.

Under this long-settled precedent, which the Judge properly applied, the Solicitation and Distribution policy contained in Respondent's 2010 Handbook is plainly unlawful. Thus, as in *Bristol Farms*, since Respondent enjoys no possessory property interest in parcels of land *adjacent* to Respondent's own property, it is self-evident that Respondent could not lawfully maintain this rule.

Moreover, the rule could reasonably chill Respondent's employees in the exercise of their own Section 7 rights for fear of Respondent identifying them or targeting them for reprisals after observing them speaking with or joining a third party engaged in lawful organizing or picketing activity on public property or on private property Respondent neither controls nor possesses. *Lutheran Heritage Village—Livonia*, 343 NLRB at 647. Accordingly, the Board should affirm the Judge's finding that this aspect of Respondent's Solicitation and Distribution policy violated Section 8(a)(1) of the Act (ALJD 7:18-20).

(e) The Social Media Policy Set Forth in Respondent's 2010 Handbook Contains Numerous Unlawfully Overbroad Provisions.

As the Judge correctly found, Respondent's 2010 Handbook contains numerous unlawful provisions (ALJD 7:22-8:18). As illustrated below, Board law squarely supports the Judge's findings.

The portion of Rule 1 of the 2010 Handbook's Social Media policy that prohibits employees from disclosing "any personal or financial information of employees, customers, or other persons" is unlawful, absent clarification, because employees would reasonably construe it to prohibit them from discussing terms and conditions of

employment among themselves or with outside parties, including labor organizations – activities that Section 7 clearly protects. This rule is also unlawful to the extent that it prohibits employees from disclosing "any confidential or proprietary" company information since, as noted above, Respondent's definition of confidential information in the 2010 Handbook is itself unlawfully overbroad. Even assuming Respondent has a legitimate interest in preventing the disclosure of certain confidential and proprietary information, the definitions of these terms provided elsewhere in Respondent's policies are so broad that employees would reasonably construe them to include information about employee wages and working conditions. <sup>16</sup>

As the Judge found, a portion of Rule 2 of the 2010 Handbook's Social Media policy requires an employee to "identify himself/herself" when "posting comments about the Company or related to the Company's business or a policy issue" is unlawfully overbroad.<sup>17</sup>

The Judge correctly found that Rule 5 of the 2010 Employee Handbook's Social Media policy, which instructs that an employee should not refer to Respondent or identify his or her connection to Respondent if an online blog, posting, or other social media activities are inconsistent with or would negatively impact Respondent's

<sup>&</sup>lt;sup>15</sup> Bigg's Foods, 347 NLRB at 425 n.4; Cintas Corp., 344 NLRB 943, 943 (2005) (employees would reasonably construe confidentiality rule's unqualified prohibition of the release of "any information" regarding its employees to restrict discussion of wages and other terms and conditions of employment among fellow employees and with the union); Kinder-Care Learning Centers, 299 NLRB at 1172.

<sup>&</sup>lt;sup>16</sup> See *Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at 1 (finding unlawfully overbroad employer's rule prohibiting disclosure outside the company of, among other things, "personnel information and documents" on pain of termination); *Fremont Mfg. Co.*, 224 NLRB 597, 603-604 (1976) (rule prohibiting employees from "[m]aking any statement or disclosure regarding company affairs, whether express or implied as being official, without proper authorization from the company" unlawful).

<sup>&</sup>lt;sup>17</sup> As noted in Counsel for the General Counsel's Cross-Exception Number 2 and Brief in Support, the Judge failed to make a finding of law that this provision violated Section 8(a)(1) of the Act. For the reasons articulated therein, Counsel for the General Counsel requests that the Board modify the Judge's decision to include this finding of law.

reputation or brand, violates Section 8(a)(1) of the Act (ALJD 7:22-8:18). By its terms, this rule's broad prohibition against referring to Respondent in postings that would "negatively impact the Company's reputation or brand" clearly encompasses concerted communications protesting Respondent's treatment of its employees. Indeed, there is nothing in Rule 5 that informs employees that communications protected by Section 7 are excluded from the rule's broad parameters. Moreover, an employee reading the rule would reasonably assume that the Employer would regard certain Section 7 statements, such as those critical of the Employer's labor policies or its treatment of employees, as negatively impacting its reputation or brand. Accordingly, the Board should affirm the Judge's finding that by maintaining this rule Respondent reasonably tended to inhibit employees' protected activity in violation of Section 8(a)(1) (ALJD 7:22-8:18).

As with Rule 5, above, Rule 7 of the 2010 Handbook's Social Media policy contains a broad prohibition against employees engaging in activities that could "have a negative effect on the Company." The Judge rightly concluded that this rule violates Section 8(a)(1) of the Act (ALJD 8:12-18). This rule is unlawful because it encompasses concerted communications protesting Respondent's treatment of its employees. Moreover, this rule not only restricts employees' social media activities, but

<sup>&</sup>lt;sup>18</sup> Although Rule 11 of the 2010 Employee Handbook's Social Media policy stated that nothing in Respondent's Social Media policy was intended to interfere with employees' rights under the Act, it is well settled that such general disclaimers are inadequate. See *Ingram Book Co.*, 315 NLRB 515, 516 n.2 (1994) (finding maintenance of a disclaimer that"[t]o the extent any policy may conflict with state or federal law, the Company will abide by the applicable state or federal law" did not salvage the employer's overbroad no-distribution policy).

<sup>&</sup>lt;sup>19</sup> Karl Knauz Motors, Inc., 358 NLRB No. 164, slip op. at 1-2 (finding the maintenance of a rule prohibiting "disrespectful conduct" and "language that injures the image or reputation of the Dealership" unlawful). See also Costco Warehouse Corp., 358 NLRB No. 106, slip op at 1-2 (finding the maintenance of a rule prohibiting "statements posted electronically that damage the Company . . . or damage any person's reputation" unlawful).

also proscribes conduct communicated "in person or by phone," which employees would reasonably construe as applying to any protected conduct criticizing Respondent's labor policies or treatment of its employees, including participating in labor disputes or demonstrations. In addition, the portion of the rule prohibiting employees from engaging in such conduct "even if the conduct occurs off the property or off the clock" is facially overbroad because employees have the right to engage in Section 7 activities on Respondent's premises during non-work time and in non-work areas, as well as away from Respondent's premises on their personal time. <sup>20</sup>

Next, the Judge correctly found that Rule 8 in the 2010 Handbook's Social Media policy which prohibits employees from using Respondent's intellectual property, logos, trademarks, and copyrights, violates Section 8(a)(1).<sup>21</sup> As set forth below, Board law fully supports the Judge's finding that Rule 8 is unlawful. Thus, absent further explanation, employees would reasonably understand this rule to prohibit the use of Respondent's logo or trademark in their online Section 7 protected communications, which could include electronic leaflets, cartoons, or even photos or picket signs containing Respondent's logo.<sup>22</sup> Although Respondent has a proprietary interest in its trademarks, including its logo if trademarked, employees using its name, logo, or other trademark while engaging in Section 7 activity would not infringe on that interest. The

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<sup>&</sup>lt;sup>20</sup> See *Republic Aviation Corp v. NLRB*, 324 U.S. at 803 n.10 (1945) (employees have the right to engage in Section 7 activities on the employer's premises during non-work time and in non-work areas).

<sup>&</sup>lt;sup>21</sup> Although the Judge correctly found that Rule 8 violated the Act, he failed to make a finding of fact that a portion of Rule 8 prohibits employees from using Respondent's logo for any purpose. As set forth in Counsel for the General Counsel's Cross-Exception 3 and in his Brief in Support, the Board should modify the Judge's findings of fact in this regard in order for them to conform to his legal finding.

<sup>&</sup>lt;sup>22</sup> Pepsi-Cola Bottling Co., 301 NLRB 1008, 1019-1020 (1991), enfd. 953 F.2d 638 (4th Cir. 1992) (prohibiting employees from wearing company logo or insignia while engaging in union activity during non-working time away from the plant unlawful).

interests that courts have identified as being protected by trademark laws<sup>23</sup> do not remotely implicate employees' non-commercial use of a name, logo, or other trademark to identify Respondent in the course of employees engaging in Section 7 activity related to their working conditions.<sup>24</sup>

The Judge correctly found that Rule 8 of the 2010 Handbook's Social Media policy also unlawfully prohibits employees from posting videos or photos that are recorded in the workplace (ALJD 7:42-43; 8:12-18). Employees would reasonably interpret such a prohibition as precluding them from using social media to communicate and share information regarding working conditions through pictures and videos, such as employees working without proper safety equipment or in hazardous conditions.<sup>25</sup> In sum, the Judge rightly concluded that this provision is unlawful.

Likewise, the Judge properly found that Rule 9 of the 2010 Handbook's Social Media policy, which instructs employees to contact Respondent's Vice President of Operations before making any comment to the media, violates section 8(a)(1) of the Act

<sup>&</sup>lt;sup>23</sup> These interests are: (i) the trademark holder's interest in protecting the good reputation associated with his mark from the possibility of being tarnished by inferior merchandise sold by another entity using the trademark; (ii) the trademark holder's interest in being able to enter a related commercial field at some future time and use its well-established trademark; and (iii) the public's interest in not being misled as to the source of products offered for sale using confusingly similar marks. See *Scarves by Vera*, 544 F.2d 1167, 1172 (2d Cir. 1976). See also *Smith v. Chanel, Inc.*, 402 F.2d 562, 565 (9th Cir. 1968) (touchstone of trademark infringement is likelihood of confusion that the product sold by the second entity is the trademark holder's product).

<sup>&</sup>lt;sup>24</sup> Even if trademark principles applied to this kind of use, no unlawful infringement exists where using a trademark would not confuse the public regarding the source, identity, or sponsorship of the product. See, e.g., *Smith v. Chanel, Inc.*, 402 F.2d at 565, 569 (use of trademark in an advertisement comparing alleged infringer's product to the trademark holder's product not unlawful because it did not create a reasonable likelihood that purchasers would be confused as to the source, identity, or sponsorship of the advertiser's product).

<sup>&</sup>lt;sup>25</sup> See, e.g., *Sullivan, Long & Hagerty*, 303 NLRB 1007, 1013 (1991), enfd. 976 F.2d 743 (11th Cir. 1992) (employee tape recording at jobsite to provide evidence in a Department of Labor investigation considered protected); Cf. *Flagstaff Medical Center*, 357 NLRB No. 65, slip op. at 4-5 (2011) (holding that rule prohibiting employees from taking photographs of hospital patients or property was lawful in light of hospital patients' "weighty" privacy interests and "significant" employer interest in preventing wrongful disclosure of individually identifiable health information).

(ALJD 8:12-18). Board law fully supports the Judge's finding. In this regard, the Board has long recognized that "Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute." Therefore, the Judge properly found that Respondent's Rule 9 is unlawfully overbroad. 27

Rule 10 of the 2010 Employee Handbook provides that Respondent may request that employees provide it access to any commentary they posted on social media sites. This requirement is unlawfully overbroad. This provision, like the provision discussed in Rule 2 above, would effectively permit the Employer to ascertain and surveil an employee's participation in Section 7 activities, thus chilling protected communications for fear of future retaliation.<sup>28</sup> Accordingly, the Board should uphold the Judge's conclusion that this rule is unlawful (ALJD 8:12-18).

Finally, the Judge properly found that Rule 11 of the 2010 Handbook, which admonishes employees to write or post "respectfully," is unlawful (ALJD 8:12-18). As written, this rule is unlawful because employees would reasonably construe this instruction to prohibit certain Section 7 activity, such as employees' protected communications – whether directed to coworkers, managers, or third parties who deal with Respondent – that are critical of working conditions and look to collective action to improve them.<sup>29</sup> That is, an employee reading this rule would reasonably conclude that

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<sup>&</sup>lt;sup>26</sup> Valley Hospital Medical Center, 351 NLRB 1250, 1252 (2007) (holding nurse's third-party statements regarding staffing levels and workloads protected where context of statements clearly related to labor dispute and nurses' terms and conditions of employment).

<sup>&</sup>lt;sup>27</sup> See *Trump Marina Casino Resort*, 355 NLRB 585, 585 (2010), incorporating by reference 354 NLRB 1027 (2009) (finding policy requiring prior authorization before speaking to the news media unlawful).

<sup>&</sup>lt;sup>28</sup> Cf. Special Touch Home Care Services, 357 NLRB No. 2, slip op. at 7 (2011).

<sup>&</sup>lt;sup>29</sup> See *Karl Knauz Motors, Inc.*, 358 NLRB No. 164, slip op. at 1, citing *Costco Wholesale Corp.*, 358 NLRB No. 106; *Claremont Resort & Spa*, 344 NLRB 347, 348 (2000), enfd. 297 F.3d 468 (6th Cir. 2002) (finding rule that prohibited "negative conversations about associates and managers" unlawful); *University* 

Respondent would regard statements protesting or criticizing Respondent, its policies, or its managers as disrespectful.

For the reasons set forth below in Section 2 regarding Respondent's Exceptions 2, 3, 5, and 6, Respondent's "savings clause" does not cure Rule 11's otherwise unlawful provision, nor does it cure the other unlawful provisions of the Social Media policy in general.

Finally, the Judge properly rejected Respondent's contention that the allegations contained Paragraphs 7 and 8 of the Amended Complaint are moot because Respondent revised the 2010 Handbook policies at issue – with the exception of Respondent's Dress Code and Personal Hygiene policy – when it published and distributed its 2013 Handbook. To the contrary, settled Board law plainly establishes that the Board has not adopted this approach. See, e.g., *Medford Building & Trades Council (Kogap Lumber Industries)*, 96 NLRB 165, 166-167 (1951) (mere discontinuance of alleged unfair labor practices does not render case moot, and Board order was necessary to effectuate the Act's policies, which require both dissipating the effects of unremedied unfair labor practices and preventing similar unlawful conduct recurring in the future). Therefore, it is evident that the Judge properly found not only that these Handbook provisions are unlawful, but also that a Board order is required to remedy them and to effectuate the Act's policies (ALJD 5:10-17).

*Medical Center,* 335 NLRB at 1320-1322 (rule against "disrespectful conduct" toward others unlawful because it included no limiting language that removed the rule's ambiguity and limited its broad scope).

2. The Judge correctly relied on Passavant Memorial Area Hospital, 237
NLRB 138 (1978), and Electrical Workers IBEW Local 1316 (Superior Contractors), 271 NLRB 338 (1984), in concluding that Respondent violated Section 8(a)(1) with respect to various provisions contained in its 2010 Handbook. (Respondent's Exceptions 2, 3, 5, and 6)

In *Passavant Memorial Medical Center*, 237 NLRB 138, 138-139 (internal citations omitted), the Board articulated the requirements a party must satisfy to effectively repudiate its unlawful conduct. A party's repudiation must be timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct. In addition, the repudiation must be adequately published and there must be no proscribed employer conduct after the publication. Finally, any such repudiation of coercive conduct should assure employees that in the future the employer will not interfere with employees exercising their Section 7 rights. In *Electrical Workers IBEW Local 1316 (Superior Contractors)*, 271 NLRB 338, 341 (1984), the Board also considered the fact that the respondent in that case only took remedial action after the complaint had issued.<sup>30</sup>

Applying this established precedent to the record evidence, the Judge properly found that Respondent has failed to satisfy *Passavant's* requirements. Although the Judge concluded that Respondent adequately published its repudiation by virtue of issuing its revised 2013 Handbook, he correctly noted that the 2013 Handbook still includes the unlawful Dress Code and Personal Hygiene policy and that there was no

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<sup>&</sup>lt;sup>30</sup> In this regard, Respondent disingenuously asserts on brief that, while it is unclear whether the Judge relied on this proposition in finding that Respondent failed to adequately cure any of the unlawful provisions in the 2010 Handbook until after the December 31, 2013 Complaint issued, "the fact is that [Respondent] issued its revised policies in May 2013, more than a month before the General Counsel issued [his] Amended Complaint, which is the operative complaint in this matter." The obvious reason the General Counsel issued his amended complaint on June 17, 2013 is that it conformed the pleadings to the facts of the case – i.e., from December 21, 2011 until April 2013 Respondent maintained numerous unlawful provisions in its 2010 Handbook, and revised all of these provisions except for the unlawful Dress Code and Personal Hygiene Policy contained in its 2013 Handbook.

evidence that the Respondent provided its employees with any assurances that it would not interfere with employees' Section 7 rights in the future (ALJD 5:44-47). The Judge also correctly found that only *after* complaint issued on December 31, 2012 did Respondent engage the Regional Office in settlement discussions (ALJD 5:39-42).

Respondent mistakenly relies on *River's Bend Health & Rehabilitation Service*, 350 NLRB 184 (2007), and Claremont Resort & Spa, 344 NLRB 832 (2005). In River's Bend Health & Rehabilitation Service, the Board adopted the ALJ's dismissal of a Section 8(a)(5) unilateral change allegation concerning an increase in meal prices. In River's Bend, supra, the ALJ there concluded that the employer cured its unilateral change although he found that the employer's repudiation did not "completely accord with the Passavant criteria with regard to timeliness and lack of ambiguity." He further noted that two memoranda the employer issued at least implicitly conceded that it had acted unlawfully and provided assurances that the employer would not unilaterally increase meal prices in the future. *Ibid.* Here, by contrast, Respondent's attempted repudiation incontrovertibly did not satisfy Passavant's criteria. Thus, Respondent offered no assurances to its employees that it would not violate the Act in the future and, indeed, Respondent continues to violate the Act because, as the Judge found, Respondent's 2013 Handbook still contains the unlawful Dress Code and Personal Hygiene policy (ALJD 5:45-47). Accordingly, River's Bend Health & Rehabilitation Service is markedly distinguishable from the instant case and does not advance Respondent's argument. The Board's statement in Claremont Resort & Spa that it did not "necessarily endorse" all of the elements of Passavant, supra, is on its face equivocal and hardly supports Respondent's contention that its failure to assure

employees it would not violate the Act in the future – which, as noted above,
Respondent has failed to do – is an insufficient basis for finding that Respondent failed to repudiate its unlawful policies. Significantly, the *Claremont Resort* Board stated that "while not passing on all of the aspects of *Passavant*, we nevertheless agree...that the [employer's] May 5 notice did not cure the [employer's] unlawful conduct." *Id.* at 832-833. Therefore, *Claremont Resort & Spa* simply does not stand for the proposition that the Board no longer requires a party to adhere to *Passavant's* requirements.

Moreover, the fact that the record in the instant case includes evidence that Respondent's employees have previously engaged in Section 7 protected activity and that Respondent never unlawfully disciplined any employees for violating the 2010 Handbook's policies is irrelevant to the Judge's finding that Respondent maintained unlawful 2010 Handbook provisions and continues to maintain an unlawful 2013 Handbook provision. *Hills and Dales General Hospital*, 360 NLRB No. 70, slip op. at 1 (2014).

Respondent's attempt to demonstrate that it has offered employees "myriad assurances" that it would not interfere with their Section 7 rights is both unavailing and unsupported by Board law. In this regard, Respondent cites to various Handbook provisions not in issue, each of which it claims "explicitly assure employees that [Respondent] will not interfere with any rights 'protected by law'." Specifically, Respondent cites the following provisions:

 Company Values and Guiding Principles policy, which provides that Respondent must never discriminate in any way because of race, color,

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<sup>&</sup>lt;sup>31</sup> It goes without saying that providing such assurances to employees is a bedrock element of an employer effectively repudiating its unlawful conduct, and Respondent's argument in this regard is spurious.

- religion, sex, age, handicap, or other legally protected status (GCX 3 at p. 5);
- Equal Employment Policy, which refers to any status protected by law, such as race, color, religious creed, national origin, ancestry, sex, pregnancy, age, disability, sexual orientation, genetic information, military or veteran status, or any other status protected by law (GCX 2 at p.5; GCX 3 at p.6);
- Policy Prohibiting Unlawful Harassment and Discrimination, which refers to protected statuses, including race, color, religious creed, national origin, ancestry, sex, pregnancy, age, disability, sexual orientation, gender identity, genetic information, military or veteran status, marital status, or any other status protected by law (GCX2 at p.10; GCX 3 at p. 6); and
- Conflict of Interest/Code of Ethics provision, which refers to Respondent's commitment to ethical and legal business practices (GCX 2 at p. 36; GCX 3 at p. 37).

Initially, it is beyond doubt that no employee reading Respondent's Company Values and Guiding Principles provision, Equal Employment Policy, or Policy Prohibiting Unlawful Harassment and Discrimination could interpret these policies as even remotely relating to Section 7 rights. Likewise, Respondent's Conflict of Interest/Code of Ethics provision, with its vague reference to legal business practices, is simply not susceptible to being interpreted as encompassing employees' Section 7 rights. Moreover, it is well settled that Respondent's general disclaimers – like Respondent's references to "other legally protected status" and "any other status protected by law" – are inadequate to save Respondent's overbroad policies. See *Ingram Book Co.*, 315 NLRB 515, 516 n.2 (1994) (finding that maintenance of a disclaimer that "[t]o the extent any policy may conflict with state or federal law, the Company will abide by the applicable state or federal law" did not salvage the employer's overbroad no-distribution policy). Therefore, Respondent's argument in this regard is directly at odds with Board law and cannot be credited.

3. The Judge correctly concluded that in May 2013 Respondent issued the 2013 Handbook, modifying the 2010 Handbook provisions in issue with the exception of the Dress Code provision. (Respondent's Exception 4)

Contrary to Respondent's assertion, the Judge correctly found that in May 2013, Respondent issued its 2013 Handbook, revising the 2010 Handbook provisions in issue, with the exception of the Dress Code and Personal Hygiene policy (ALJD 5:39-44). A simple comparison of these provisions in Respondent's 2010 and 2013 Handbooks reveals that the Judge's finding in this regard is entirely accurate. Thus, Respondent's 2010 Handbook contains a Dress Code and Personal Hygiene policy which provides, in relevant part, that "[e]mployees who have contact with the public may not wear pins, insignia, or other message clothing which are not provided to them by the Company" (GCX 2 at p. 31), while Respondent's 2013 Handbook contains a Dress Code and Personal Hygiene policy which provides, in relevant part, that "[e]mployees who have contact with the public may not wear pins, insignia, or other message clothing." (GCX 3 at p. 33).

It is, therefore, evident that with the exception of the clause "which are not provided to them by the Company," included in the 2010 Handbook, the 2013 Handbook did not materially alter this aspect of Respondent's Dress Code and Personal Hygiene Policy. Accordingly, Respondent's exception to the Judge's finding in this regard is entirely without merit.

4. The Judge correctly concluded that Respondent has not established any special circumstances warranting the prohibition of wearing insignia or other message clothing and that Respondent's blanket prohibition banning employees from wearing insignia or other message clothing violates

Section 8(a)(1) of the Act. (Respondent's Exceptions 8, 9, 10, and 12) 32

Respondent asserts that the Judge erred by relying on *Pathmark Stores, Inc.*, 342 NLRB 378 (2004) and *Titus Electric Contracting, Inc.*, 355 NLRB 1357 (2010), in finding that Respondent has not established any special circumstances warranting the prohibition of wearing insignia or other message clothing and that Respondent's blanket prohibition banning employees from wearing insignia, or other message clothing violates Section 8(a)(1) of the Act (ALJD 8:52-9:9). However, even assuming that *Pathmark Stores, Inc.* and *Titus Electric Contracting, Inc.* do not support the Judge's finding in this regard, as set forth below, Board law is replete with precedent which fully supports the Judge's conclusion that Respondent failed to establish special circumstances permitting it to maintain a complete ban in its 2010 and 2013 Handbooks on employees who have contact with the public wearing insignia or other message clothing.

Section 7 of the Act protects employees' right to wear attire and insignia addressing employment-related issues while at work.<sup>33</sup> An employer may only restrict

<sup>&</sup>lt;sup>32</sup> Counsel for the General Counsel filed cross-exceptions to the Judge's finding (ALJD at 8:45-9:9) that Respondent had established a special circumstance – safety – which privileged it to ban employees from wearing pins. See Counsel for the General Counsel's Cross-Exceptions to the Decision of the Administrative Law Judge, Cross-Exception 4, and Counsel for the General Counsel's Brief in Support of Cross-Exceptions to the Decision of the Administrative Law Judge, Cross-Exception 4. By responding herein only to Respondent's Exceptions 8, 9, 10, and 12 concerning the Judge's finding that Respondent failed to establish special circumstances permitting it to bar employees from wearing insignia or other message clothing, Counsel for the General Counsel does not waive Cross-Exception Number 4 and the related argument in his Brief in Support.

<sup>&</sup>lt;sup>33</sup> Republic Aviation Corp. v. NLRB, 324 U.S. 793, 801-803 (1945) (upholding employees' right to wear union buttons while on the job); AT&T Connecticut, 356 NLRB No. 118, slip op. at 1 (2011) (upholding right of employees who enter customers' homes to express employment-related grievances by wearing "prisoner" t-shirts reading "Inmate #" and "Prisoner of AT\$T [the employer]").

such activity by presenting "substantial evidence of special circumstances" sufficiently important to outweigh Section 7's guarantees.<sup>34</sup> The Board has found special circumstances when the display of union insignia would likely jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image the employer has established as part of its business plan.<sup>35</sup> However, "[t]he mere fact that an employer has a dress code . . . is not a special circumstance" that warrants depriving employees of their right to wear union-related insignia at work.<sup>36</sup> Similarly, just because employees come into regular contact with customers or that customers may be displeased by employees' wearing union-related insignia is insufficient to establish special circumstances.<sup>37</sup> Instead, the Board will find special circumstances in cases involving employees with customer contact where there is substantial evidence that the display of union insignia "unreasonably

<sup>&</sup>lt;sup>34</sup> Government Employees, 278 NLRB 378, 385 (1986) (explaining that "[t]he law is clear that substantial evidence of special circumstances…is required before an employer may prohibit wearing of union insignia, and the burden of establishing those circumstances rest[s] on the employer," and holding that an employer's "generalizations and conclusions" were insufficient to establish special circumstances).

<sup>&</sup>lt;sup>35</sup> *PSK Supermarkets*, 349 NLRB 35, 35 (2007) (finding no special circumstances despite non-discriminatory nature of employer's prohibition on buttons and fact that employees had customer contact and were required to wear uniforms).

<sup>&</sup>lt;sup>36</sup> Woonsocket Health Center, 245 NLRB 652, 659 (1979). See also Stabilus, Inc., 355 NLRB 836, 838 (2010); PSK Supermarkets, 335 NLRB at 35; Quantum Electric, Inc., 341 NLRB 1270, 1274, 1280-1281 (2004) (finding unlawful employer's discharge of employee for wearing union t-shirt because ban on all shirts with graphics or printed text other than company-issued shirts was not justified by special circumstances); Great Plains Coca-Cola Bottling Co., 311 NLRB 509, 515 (1993) (finding employer's prohibition of union jackets unlawful, as no special circumstances demonstrated).

<sup>&</sup>lt;sup>37</sup> PSK Supermarkets, 349 NLRB at 35; Howard Johnson Motor Lodge, 261 NLRB 866, 868 n.6 (1982), enfd. 702 F.2d 1 (1st Cir. 1983) (employer not justified in prohibiting union buttons in order to avoid potentially adverse reaction by customers because employees' rights do not depend on "the pleasure or displeasure of an employer's customers"); Nordstrom, Inc., 264 NLRB 698, 701-702 (1982) (employer's desire to avoid creating controversy among customers insufficient justification for ban on union insignia); Eckerd's Market, Inc., 183 NLRB 337, 337-338 (1970) (general evidence of customer displeasure with union buttons insufficient to establish special circumstances); Floridan Hotel of Tampa, 137 NLRB 1484, 1486 (1962), enfd. 318 F.2d 545 (5th Cir. 1963) (fact that employees "come into contact with...customers does not constitute such 'special circumstances' as to deprive them of their right, under the Act, to wear union buttons at work).

interfere[s] with a public image which the employer has established as part of its business plan" through strict dress code requirements.<sup>38</sup>

Applying these settled Board law principles, it is obvious that Respondent has not carried its burden that substantial evidence of special circumstances exists which justifies its ban on employees wearing insignia or message clothing. First, the fact that Respondent prohibits its employees, including technicians and service advisors, from wearing any type of insignia or other message clothing is not a special circumstance substantiating Respondent's ban. See *PSK Supermarkets*, 349 NLRB at 35. Likewise, the mere fact that employees wear uniforms and interact with the public is insufficient evidence to satisfy Respondent's burden of proving special circumstances. *Ibid.* See also *Quantum Electric, Inc.*, 341 NLRB at 1274, 1280-1281; *Floridan Hotel of Tampa*, 137 NLRB at 1486.

Respondent has likewise failed to establish that its business image justifies banning all insignia and other message clothing. Though Respondent's General Manager Mark Doran testified that Respondent seeks to project a professional image, spends hundreds of thousands of dollars per month on advertising, and is in business solely "to sell cars and service customers," Respondent failed to demonstrate that permitting employees to wear insignia, or other message clothing has or would unreasonably interfere with its business image or its sales and service goals. As noted above, the mere fact that technicians, service advisors, and sales associates wear uniforms and have customer contact does not satisfy the Board's special circumstances test. *PSK Supermarkets*, 349 NLRB at 35; *Woonsocket Health Center*, 245 NLRB at

<sup>&</sup>lt;sup>38</sup> Meijer, Inc., 318 NLRB 50, 50 (1995). But see *PSK Supermarkets*, 349 NLRB at 34-35 (employer's requirement that employees wear company-issued uniforms, along with those employees' "significant customer contact" did not constitute special circumstances justifying employer's ban on all buttons).

659; Floridan Hotel of Tampa, 137 NLRB at 1486. And, even assuming, arguendo, that Respondent had received customer complaints concerning employees wearing insignia or other message clothing promoting the Union – which could potentially interfere with Respondent's sales and service targets – this would be insufficient to establish special circumstances that warrant depriving Respondent's employees of their statutory right to wear union-related insignia or message clothing at work. Howard Johnson Motor Lodge, 261 NLRB at 868, n.6; Nordstrom, Inc., 264 NLRB at 701-702; Eckerd's Market, Inc., 183 NLRB at 337-338.39 Moreover, technicians display Union stickers on their toolboxes, customers can observe technicians' work space through windows in the dealership, and service advisors at times escort customers into the shop to review repair recommendations firsthand. These facts cast enormous doubt on Respondent's assertion that its business image or sales goals would suffer if employees wore insignia, or message clothing. 40 Finally, employees have previously engaged in lawful picketing on Respondent's property; notably, however, the record does not contain any evidence that this activity injured Respondent's business. These purported concerns are, therefore, insufficient to carry Respondent's heavy special circumstances burden.

<sup>&</sup>lt;sup>39</sup> Respondent's reliance on *Burger King Corp. v. NLRB*, 725 F.2d 1053, 1054 (6<sup>th</sup> Circuit 1984) (holding that the employer was privileged to ban employees who had contact with the public from on wearing union buttons because the employer attempted to project a clean, professional image to the public, consistently enforced its policy in a non-discriminatory manner, derived recognition from its image, and did not enact the policy in response to union activity), is misplaced. Neither the Board nor the First Circuit has ever adopted the Sixth Circuit's *Burger King* rationale.

<sup>&</sup>lt;sup>40</sup> Respondent in fact permitted employees to wear message clothing such as Boston Red Sox and Boston Bruins shirts during a benefit/fundraiser in support of Boston Strong. Though an isolated instance, this nevertheless undermines Respondent's supposed business image special circumstances claim. *W San Diego*, 348 NLRB 372, 374 (2006), finding lawful a complete ban on employees wearing pins and buttons in public areas where no other adornments were permitted, is easily distinguishable because here, unlike there, Respondent permits employees to wear other adornments – specifically, a maximum of two (2) studs or one (1) stud and one (1) small hoop in an ear. GCX 2 at pp. 30-31; GCX 3 at pp. 32-33.

Thus, even assuming, arguendo, that the Judge mistakenly relied on *Pathmark Stores, Inc.* and *Titus Electrical Contracting, Inc.* in finding that Respondent violated Section 8(a)(1) of the Act by maintaining a rule in its 2010 Handbook and in its 2013 Handbook prohibiting employees from wearing insignias or other message clothing, the Judge's legal conclusion in this regard is correct and is amply supported by Board law, as argued above.

5. The Judge correctly concluded that because the 2010 Handbook was in effect, and the 2013 Handbook is in effect, at all Boch Enterprises dealerships and entities, employees at all such enterprises should be aware of his findings, and the Judge both fashioned an appropriate remedy and issued an appropriate order. (Respondent's Exceptions 13, 14, and 15)<sup>41</sup>

Contrary to Respondent's assertions, the Judge correctly found that the appropriate remedy and order for Respondent's unfair labor practices must apply to all Boch Enterprises entities at which the 2010 Handbook applied and at which the 2013 Handbook applies (ALJD 9:35-10:21). It is undisputed that these Handbooks applied to employees of various Boch Enterprises dealerships and retail business entities (T. 17-21; GCX 4). Notably, Respondent concedes on brief that the record evidence shows that Ernie Boch owns Boch Honda and "also owns other dealerships and related retail businesses" subject to the Handbooks in issue. Accordingly, Respondent's assertion that "Boch Honda's 'companywide' policy was only effective at Boch Honda's single facility" is simply untrue. As set forth below, Respondent's contention that any remedy and order cannot apply to Boch Enterprises entities other than Boch Honda elevates form over substance and is in direct conflict with settled Board law.

<sup>&</sup>lt;sup>41</sup> Although the Judge fashioned an appropriate remedy and issued an appropriate order, Counsel for the General Counsel filed cross-exceptions to the Judge's proposed Notice to Employees. See Counsel for the General Counsel's Cross-Exception Number 6, related argument in his Brief in Support, and his proposed Notice to Employees, attached as Appendix A to his Brief in Support.

The Board has held that it is appropriate to require a notice posting remedy at all employer facilities where the unlawful policy at issue was in effect, even though some of the impacted locations were not subject to the proceeding. *Albertsons, Inc.*, 303 NLRB 1013, 1013 n.2 (1990), enf. denied 17 F.3d 395 (9th Cir. 1994). See also *Kinder-Care Learning Centers*, 299 NLRB at 1171 n.1, 1176 (Board ordered notice posting at all locations where unlawful companywide policy had been adopted); *Guardsmark, LLC*, 344 NLRB 809, 812 (2005) (Board has consistently held that where an employer's overbroad rule is maintained companywide, it will generally order the employer to post an appropriate notice at all facilities where the unlawful policy has been or is in effect). As noted above, the record in the instant case makes clear that the offending provisions of the 2010 Handbook applied, and that the offending provision of the 2013 Handbook apply, not only to Respondent's employees, but to employees at all of the various Boch automobile dealerships and business entities included under the Boch Enterprises umbrella.

The instant case is distinguishable from *Marriot Corp.*, 313 NLRB 896 (1994), where the Board rejected ordering a companywide notice posting remedy because, inter alia, the General Counsel did not present evidence that the rule in question applied at any other location. The record here contains exactly such evidence. Accordingly, here, as in *Albertsons, Inc., Kinder-Care Learning Centers*, and *Guardsmark, LLC*, the appropriate remedy for Respondent's unfair labor practices must apply to all Boch automobile dealerships and business entities at which the 2010 Handbook applied and at which the 2013 Handbook applies.

Respondent's argument that the "non-party employers" – whose employees were and are indisputably covered by the 2010 and 2013 Handbooks, respectively – were denied the opportunity to present evidence supporting a narrower remedy, is unavailing. Respondent's argument that these are separate legal entities or are owned by separate legal entities, and that their employees are hired and supervised by those facilities, not by Boch Honda, completely ignores the incontrovertible fact that the same employment policies set forth in the Handbooks apply to all employees working at any Boch Enterprises entity. Thus, regardless of who hires or supervises these employees, the exact same work rules apply to them no matter which Boch Enterprises entity employs them. Indeed, the record reveals that employees were expected to report violations of the 2010 Handbook's Social Media Policy to Jim Carroll, who serves as Chief Administrative Officer for all of the enumerated Boch Enterprises entities, and that the 2013 Handbook provides that employees are expected to direct all media inquiries to the Chief Administrative Officer and/or Chief Operating Officer (T. 27-28; GCX 2 at p. 34; GCX 3 at p. 35). Thus, Respondent simply ignores the reality that, in order to effectuate the Act's purposes, an appropriate remedy and order must extend to each facility at which the unlawful Handbook policies were and are maintained.

Even assuming for the sake of argument that, as Respondent contends, various other Boch Enterprises entities might have presented different or additional "special circumstances" evidence, satisfying this substantial legal burden has no bearing on any of the unlawful Handbook provisions in issue other than Respondent's unlawful Dress Code and Personal Hygiene Policy. Quite simply, Respondent seeks to extend settled

precedent well beyond the scope of the Board's "special circumstances," which applies only to matters of attire and insignia. See *Government Employees*, 278 NLRB at 385.

In sum, the Board should uphold the scope of the remedy and order the Judge issued. To do any less would undermine the Act's remedial purposes and would deny affected employees covered by the Boch Enterprises Handbooks in issue critical knowledge about the extent of their Section 7 rights.

#### F. CONCLUSION

For all of the reasons set forth above, the Board should deny each of Respondent's Exceptions and affirm those of the Judge's findings of fact and conclusions of law to which Respondent objects. The Board should also affirm the Judge's conclusions concerning the scope of the remedy and order he fashioned, which will properly effectuate the Act's signal purpose – protecting employees in the exercise of their Section 7 rights.

Dated at Boston, Massachusetts this 14th day of April, 2014.

Respectfully submitted,

Daniel F. Fein

Counsel for the General Counsel National Labor Relations Board

Region 01

Thomas P. O'Neill Jr. Federal Building 10 Causeway Street, Sixth Floor

Boston, Massachusetts 02222-1072

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